Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

MONIKA CHESHEWALLA, ROBERT J. PETKOFF, AND AARON P. MICHAELS,
Petitioners,

v.

RAND & SON CONSTRUCTION COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can an employer escape vicarious liability for sexual harassment committed by a female worker's direct boss and immediate superior in the chain of command by reserving the actual power to hire and fire to an officer in the home office who never comes into contact with female workers on the basis that the direct boss is not a "supervisor" for purposes of Title VII?

2. May the court of appeals disregard the precedent of this Honorable Court recognizing that vicarious liability for sexual harassment may also be predicated on the harasser's apparent authority to take tangible employment action against the victim?

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REASONS FOR GRANTING THE WRIT 9

I. THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW DECIDED THE SIGNIFICANT THRESHOLD QUESTION OF "WHO IS A SUPERVISOR" IN A WAY THAT GIVES EMPLOYERS AN INOCULATION AGAINST LIABILITY AND EMASCULATES PROTECTION AFFORDED VICTIMS BOTH BY THE STATUTE AND THIS COURT'S PRECEDENTS. 10

II. THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH DECISIONS OF OTHER CIRCUITS ON THE IMPORTANT ISSUE OF WHO IS A SUPERVISOR IN VICARIOUS LIABILITY SEXUAL HARASSMENT CASES. 12

III. THE PETITION SHOULD BE GRANTED BECAUSE THE OPINIONS BELOW CONFLICT WITH THIS COURT'S HOLDINGS THAT VICARIOUS LIABILITY IN A SUPERVISOR SEXUAL HARASSMENT CASE MAY BE PREDICATED ON APPARENT AUTHORITY IN INSTANCES WHERE THE HARASSER LACKS THE ACTUAL AUTHORITY TO TAKE TANGIBLE EMPLOYMENT ACTION. 14

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals is reported at 415 F.3d 847 (8th Cir. 2005) and is reproduced in Appendix A to this Petition. The district court's order granting defendant's Motions for Summary Judgment is unreported and reproduced in Appendix B to this Petition.

STATEMENT OF JURISDICTION

The decision of the court of appeals and judgment were entered on July 19, 2005. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

42 U.S.C. § 2000e-2(a) provides as follows:

> (a) Employer practices. It shall be an unlawful employment practice for an employer– (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin[.]

STATEMENT OF THE CASE

This is a case of severe sexual harassment of petitioner Monika Cheshewalla by her foreman, Michael Gibbins. The district court granted summary judgment for defendant Rand & Son Construction Company ("Rand"), holding that Rand was not vicariously liable for the acts of foreman Gibbins because he did not have the actual authority to hire, fire, promote, or transfer employees and was therefore not a "supervisor" for purposes of Title VII. The court of appeals affirmed.

The court of appeals refused to consider Monika Cheshewalla's contention that, even if actual authority to hire and fire was required and even if foreman Gibbins did not have it, Rand should be vicariously liable for his harassment on the "apparent authority" standard announced in *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998). In so doing, the Eighth Circuit flatly rejected this Court's holdings.

The district court and the court of appeals also dismissed petitioners' retaliation claims.

A. Michael Gibbins' Sexual Harassment of Monika.

Gibbins was Monika's foreman at Rand. His sexual harassment of her was both pervasive and monstrous. He exposed himself to her at work and asked if she wanted to "fuck."[1] He sexually and physically harassed, threatened,

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[1] Eighth Circuit Appendix, Volume 4 ("4 App.") 1190 (290:22-291:21.)

assaulted, and battered her at work.[2] He forced her to submit to his demands for sexual intercourse by threatening her job and the jobs of her friends.[3] He used physical force against her to procure sex.[4] He took her car and would not give it back to her, instead making her ride to and from work with him.[5]

At work, Gibbins told her that if she would not be his girlfriend and let him touch her, he would have all of her friends fired but would keep her on the job and "make her life hell."[6] He proved to her that he could and would have her friends fired.[7] Alternately, he told her that if she did not submit to his sexual advances, he would hurt her physically and would have her job taken away from her.[8]

Gibbins procured her silence about his sexual harassment by threatening her with severe consequences if she told others

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[2] 2 App. **524-525**, ¶ 8; 4 App. **1055** (112:1-25), **1065** (151:7–152:25, 153:4-6), **1070** (172:2-24), **1084** (228:20-23), **1102** (298:14-19), **1114-1115** (24:2-19, 24:23–25:8-13), **1138** (118:4-25).

[3] 4 App. **1138** (120:8-22).

[4] 4 App. **1051** (96:5-13), **1052** (97:6-22), **1053** (102:3–103:22), **1054** (105:10-11).

[5] 4 App. **1058** (124:14) through **1060** (130:3), **1063** (142:9-22, 143:24–144:3), **1064** (145:5-7).

[6] 2 App. **521**, ¶ 2; 4 App. **1096** (276:1) through **1097** (277:2).

[7] 4 App. **1096** (276:8) through **1097** (277:2).

[8] 2 App. **521**, ¶ 2; **1099** (285:20–286:2), **1100** (292:15) through **1101** (293:2).

about his harassment of her.[9] He told her that if she told anyone about his conduct, he would hurt her physically and would tell people she was "messing up" and would have her job taken away from her.[10] He told her they would find her with her "head bashed in with a bullet hole in it."[11]

B. Gibbins as Monika's Supervisor.

Gibbins (i) was the only person who assigned and directed Monika's work, (ii) was the only person who gave her any information about the quality of her work and her job performance, (iii) decided whether she could or could not seek medical treatment if she were injured on the job, (iv) decided if Monika should work overtime, (v) told Monika and other laborers if layoffs were coming, (vi) told individual laborers that they were laid off, and (vii) told Monika that he could fire her and other workers.[12]

Rand Vice President Ernest Patires and Rand EEO Officer Linda Christian admitted that Gibbins was the foreman over laborers and in the chain of command above Monika.[13] Christian confirmed that Gibbins supervised other people including Monika, that Rand considered Gibbins to be

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[9] 2 App. 521, ¶ 2; 526, ¶ 16; 4 App. 989 (46:25–47:6), 1055 (112:21-25), 1073 (182:2–183:2), 1084 (20-23), 1096 (276:8) to 1097 (277:2, 279:1-21, 280: 5-22), 1099 (285:20–286:2), 1100 (292:15) through 1101 (293:2), 1102 (298:5-8, 10-24).

[10] 2 App. 521, ¶ 2; 1099 (285:20–286:2), 1100 (292:15) through 1101 (293:2).

[11] 2 App. 354.

[12] 2 App. 520; 4 App. 1055 (112:21-25).

[13] 4 App. 937 (164:24) through 938 (165:3), 1014 (11:4–12:13).

"supervisory personnel," and that Gibbins was Monika's boss.[14]

Rand Superintendent Dave Burke, Carpenter Foreman Danny Franks, and other "higher-ups" at Rand specifically told Monika that Gibbins was her foreman and supervisor.[15] Gibbins confirmed that he was "the boss of the crew" and was in "the chain of command."[16]

However, Vice President Ernie Patires was the only Rand employee with the ultimate authority to "hire and fire."[17] But Patires was not at the job site assigning, observing, or directing Monika's (or any other employee's) work and had no job interaction with her.[18] Patires could not have had direct, personal knowledge of who were the good workers and who were the bad workers and who should be laid off first because he only went to the job site once a month to look at the job and he "deals mainly with supervisor."[19]

Patires acknowledged that he relied on the supervisors' recommendations in determining who would be laid off.[20]

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[14] 4 App. **910** (56:18) through **911** (57:2), **915** (164:24–165:3).

[15] 4 App. **1050** (91:23-92:13).

[16] 4 App. **982** (17:19–18:3).

[17] 4 App. **1015** (13:3-8).

[18] 2 App. **520**.

[19] 2 App. **336-337**; 4 App. **883** (19:12-19).

[20] 4 App. **961** (23:21-24:8), **963** (30:24–31:5), **1015** (13:9-14:7, 14:12-15:2), **1020** (35:6–36:10).

Gibbins admitted that he had the power to recommend names for layoff and that, in the past, he had actually suggested the names of persons who would laid off.[21]

C. Rand Knew Gibbins Was Claiming Supervisory Authority and Ability to Lay Off Workers and Did Nothing to Stop Gibbins from Making These Claims.

Vice President Patires knew that Gibbins was threatening to fire Monika "if she told."[22] EEO Officer Christian admitted that (i) Gibbins was using Monika's friends as a threat to get favors from her, (ii) Monika believed everything Gibbins told her about layoffs, and (iii) Gibbins' apparent power to hire and fire could have been a concern to Monika.[23] Nothing in the record shows that Rand ever criticized or took action against Gibbins for threatening to fire Monika or that Rand instructed Gibbins to stop such conduct.

D. Reporting and Retaliation.

For many months, Gibbins' harassment went unreported because Monika believed that Gibbins would follow through with his threats if she came forward. Monika had previously seen women in the construction industry get forced out of work if they made sexual harassment complaints.[24] When Monika's friends were laid off after Gibbins' threat to Monika

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[21] 4 App. 999 (88:2-23).

[22] 2 App. 367 (headed "12:35 p.m."); 4 App. 1022 (41:3-15).

[23] 2 App. 354.

[24] 4 App. 1039 (48) through 1040 (49-50, 52), 1043 (64) through 1044 (65-68).